

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROBERT ASHLEY,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 99-506-SLR
)	
CHARLES CUNNINGHAM,)	
)	
Defendant.)	

MEMORANDUM ORDER

Currently pending before the Court is the defendant Charles Cunningham's motion to compel immediate payment of full filing fees and for related relief. (D.I. 9) This is the court's decision on the motion.

I. BACKGROUND

Plaintiff Robert Ashley is a pro se litigant who is presently incarcerated at the Delaware Correctional Center ("DCC") in Smyrna, Delaware. He filed the current action under 42 U.S.C. § 1983 without a request for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915, or payment of the filing fee. On August 6, 1999, the court ordered plaintiff to file a request for leave to proceed in forma pauperis and a certified copy of his prison trust account summary within thirty days, or the case would be dismissed. On September 10, 1999, the court granted plaintiff leave to proceed in forma pauperis and

determined that he had no money with which to pay an initial partial filing fee. (D.I. 5)

Plaintiff presented the following four causes action in the complaint: malicious prosecution, deprivation of property, denial of due process and excessive force. On April 3, 2000, the court dismissed the first three claims as frivolous pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1). (D.I. 6) However, the court found that plaintiff's excessive force claim against defendant Cunningham was not frivolous within the meaning of 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1) and ordered that defendant Cunningham be served with the complaint. Defendant was served on November 29, 2001. On December 11, 2001, defendant filed the present motion requesting that plaintiff "be compelled to pay in full immediately all filing fees . . . or face dismissal"

pursuant to 28 U.S.C. § 1915(g).¹ Plaintiff has not filed a response to the motion.

Defendant argues that plaintiff should have been denied leave to proceed in forma pauperis because he had "three strikes" prior to filing this complaint. Citing Abdul-Akbar v. McKelvie, 239 F.3d 307 (3d Cir. 2001), defendant argues that plaintiff has not demonstrated he was in imminent danger of serious physical injury at the time he filed the complaint and, therefore, is ineligible for pauper status.

In his complaint, plaintiff alleges that on July 23, 1997, defendant Cunningham "sprayed Plaintiff in the face, head and body with a high pressure fire hose. This caused Plaintiff to suffer a substantial amount of physical pain and emotional distress." (D.I. 2 at 3) The court was aware that plaintiff had "three strikes" pursuant to § 1915(g) at the time he filed the

¹ The Prison Litigation Reform Act ("PLRA") of 1995 provides that prisoners granted leave to proceed in forma pauperis may pay the court's filing fee in installments rather than proceeding free of charge. Section 1915(g) further provides that:

In no event shall a prisoner bring a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

See Pub.L. No. 104-134, 110 Stat. 1321 (April 26, 1996), as amended 28 U.S.C. § 1915(g).

complaint.² Although not specifically stated in the order, the court construed plaintiff's complaint as alleging that he was in imminent danger of serious physical injury at the time the alleged attack occurred. See Gibbs v. Roman, 116 F.3d 83, 86 (3d Cir. 1997) (holding that "allegations of imminent danger experienced at the time the alleged incident took place ...[are] sufficient to survive the 'three strikes' rule.") (overruled by Abdul-Akbar v. McKelvie, 239 F.3d at 312).

II. DISCUSSION

The Supreme Court has held that "when (1) the Court decides a case and applies the (new) legal rule of that case to the parties before it, then (2) it and other courts must treat that same (new) legal rule as 'retroactive' applying it, for example, to all pending cases, whether or not those cases involve predecision events." Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 752 (1995) (citing Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 97 (1993)). In Harper, the Supreme Court overruled Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), which allowed lower courts to deny "retroactive effect to 'a new principle of law' if such a limitation would avoid 'injustice or hardship' without

² The plaintiff, while incarcerated, has been granted leave to proceed in forma pauperis in three cases which were subsequently dismissed as frivolous: 1) Ashley v. Correctional Medical Services, C.A. No. 93-243-SLR (dismissed May 20, 1993); 2) Ashley v. Cunningham, C.A. No. 95-422-SLR (dismissed March 4, 1995); and 3) Ashley v. Halwk, C.A. NO. 95-523-SLR (dismissed April 19, 1996).

unduly undermining the 'purpose and effect' of the new rule." Harper v. Virginia Dep't of Taxation, 509 U.S. at 94-95 (citing Chevron Oil Co. v. Huson, 404 U.S. at 106-107). The Court reasoned that the "'nature of judicial review' strips us of the quintessentially 'legislat[ive]' prerogative to make rules of law retroactive or prospective as we see fit." Id. at 95 (quoting Griffith v. Kentucky, 479 U.S. 314, 322 (1987)). The Court also reasoned that "'selective application of new rules violates the principle of treating similarly situated [parties] the same.'" Id. (quoting Griffith v. Kentucky, 479 U.S. at 323).

The court must now determine whether the new rule of law handed down by the Third Circuit in Abdul-Akbar should be applied retroactively to this case. The Third Circuit Court of Appeals has stated that the reasoning applied in Reynoldsville and Harper presents a cogent basis for retrospectively applying new rules of law handed down by "inferior federal courts." Laborer's Int'l Union of North America, AFL-CIO v. Foster Wheeler Energy Corp., 26 F.3d 375, 386 n.8 (3d Cir. 1994). Requiring plaintiff to show that he was in imminent danger of serious physical injury at the time he filed the complaint insures the integrity of judicial review and treats similarly situated prisoners the same. See Harper v. Virginia Dept. of Taxation, 509 U.S. at 94-95. Therefore, the court shall apply the new rule of law handed down by the Third Circuit in Abdul-Akbar.

It is undisputed that plaintiff, while incarcerated, has had three pauper cases dismissed as frivolous pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1). Consequently, he may not file another action in forma pauperis unless he is in "imminent danger of serious physical injury" at the time he files the complaint. See id. Nothing in the complaint indicates that plaintiff was in imminent danger of serious physical injury at the time he filed the complaint. Consequently, he is not eligible to proceed in forma pauperis. Therefore, the court will grant the defendant's motion and revoke plaintiff's pauper status in the present action. However, the revocation is without prejudice to plaintiff's right to proceed upon prepayment of the full filing fee. If plaintiff fails to pay the full filing fee within the stated time frame, the court will dismiss the action.

NOW, THEREFORE, this 10th day of April, 2002, IT IS HEREBY ORDERED that:

1. The defendant's motion to compel immediate payment of full filing fees and for related relief (D.I. 9) is GRANTED.
2. Plaintiff's grant of leave to proceed in forma pauperis (D.I. 6) is REVOKED pursuant to 28 U.S.C. 1915(g).
3. Plaintiff shall pay the full \$150.00 filing fee within thirty (30) days from the date of this order.

4. Plaintiff's claim will be DISMISSED should the full \$150 filing fee not be received within thirty (30) days from the date of this order.

Sue L. Robinson
UNITED STATES DISTRICT JUDGE